

Letter of Findings: 06-0333
Sales and Use Tax
For the Years 2003-2004

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ISSUE

I. Food Purchases – Sales and Use Tax

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-3-2; IC § 6-2.5-5-20; *Hyatt Corp. v. Department of State Revenue*, 695 N.E.2d 1051 (Ind. Tax Ct. 1998); [45 IAC 2.2-5-38](#)

Taxpayer argues that the money it received for serving prepared meals was not subject to sales tax. Taxpayer also argues that the meals provided by a third party were not subject to use tax.

STATEMENT OF FACTS

Taxpayer owns and operates a "guest area" and other facilities. These facilities serve two entities. The two adjacent entities are licensed to conduct separate but coordinated businesses.

The entities' parent companies formed Taxpayer as a joint venture in 1995. The two parent companies each have a fifty percent ownership interest in Taxpayer. The intent of the two parent companies was to share the initial cost and ongoing expense of the land-based, support facilities – parking lots, food service, etc. – necessary for successful operation of the businesses.

The Department conducted an audit review of Taxpayer's business records and tax returns for 2003 and 2004. For 2003, The Department concluded that Taxpayer owed additional sales tax on the complimentary meals Taxpayer served to the entities' employees and the entities' customers, and additional use tax on various items. Accordingly, the Department issued notices of "Proposed Assessment." Taxpayer disagreed with the proposed assessment and submitted a protest to that effect.

Starting in December 2003, Taxpayer contracted with a third party (Company) to provide Taxpayer's dining services. Taxpayer paid Company for providing the dining services. For these sales, the Department determined that Taxpayer purchased the otherwise untaxed food served by Company and assessed use tax on these food purchases.

An administrative hearing was conducted during which Taxpayer's representative explained Taxpayer's position on the disputed issues. This Letter of Findings results.

DISCUSSION

I. Food Purchases – Sales and Use Tax

A. Prior to December 2003

Taxpayer was owned by two entities. Taxpayer supplied ancillary services necessary for the operation of the entities. Each entity owns 50 percent of Taxpayer.

Taxpayer operated a cafeteria which served free meals to the entities' employees. In addition, Taxpayer served free meals to the entities' customers. The customers were those who have received a complimentary meal voucher.

Taxpayer kept records of the meals it served to its own employees, the meals it served to the entities' employees, and the meals it served to the entities' customers.

Every month, Taxpayer sent a bill to each of the two entities for the cost of the meals served to the entities' employees and the entities' customers. The two entities reimbursed Taxpayer for the cost of the meals served to these employees and customers.

The audit review found that Taxpayer should have collected sales tax on the reimbursements received from the entities. Taxpayer argues that the meals served to the entities' employees and the entities' customers were exempt from sales tax under IC § 6-2.5-5-20(a) (amended 2004) which stated that, "Sales of food for human consumption are exempt from the state gross retail tax." According to Taxpayer, "In essence, [the entities] purchase food for human consumption exempt from Indiana sales tax under I.C. § 6-2.5-5-20 with the sole intention to provide that food free of charge to their employees and [customers]."

Taxpayer points to the decision set out in *Hyatt Corp. v. Department of State Revenue*, 695 N.E.2d 1051 (Ind. Tax Ct. 1998) as support for its position that the cost of the meals served to the entities' employees and customers was not subject to sales or use tax. In *Hyatt*, Hyatt argued that it was not subject to use tax on the food it purchased and served as complimentary meals to its own guests and employees. *Id.* at 1052. Hyatt claimed that, under IC § 6-2.5-5-20(a), its food purchases were exempt because the items purchased were "food for human consumption" and that the food items were not "food furnished, prepared, or served for consumption at a location, or on equipment provided by the retail merchant." *Id.* at 1054. See IC § 6-2.5-5-20(c)(8) (amended 2004). The court agreed with Hyatt's position. Hyatt was buying food for human consumption and giving away

meals prepared with that food. *Id.* at 1056-57. The Tax Court found that, "the fact that the food Hyatt purchased was not resold is irrelevant to the question of whether Hyatt's food purchases qualify for an exemption under section 6-2.5-5-20." *Id.* at 1057.

Indiana imposes a sales tax on retail transactions and a complimentary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. The use tax "is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2.

As noted above, "Sales of food for human consumption are exempt from the state gross retail tax." IC § 6-2.5-5-20(a). However, the phrase "food for human consumption" does not include "food furnished, prepared, or served for consumption at a location or on equipment provided by the retail merchant." IC § 6-2.5-5-20(c)(8). The Department's regulation restates the rule: "The gross retail tax exempts food for human consumption. Primarily the exemption is limited to sales by grocery stores, supermarkets, and similar type businesses of items which are commonly known as grocery food." [45 IAC 2.2-5-38](#).

Taxpayer was reimbursed for the cost of the meals served to the entities' employees and the entities' customers. The Department agreed that Taxpayer was not subject to use tax on the value of the food to Taxpayer's own employees. What is at issue is whether Taxpayer should have charged the two entities sales tax for the cost of the meals served to the entities' employees and the entities' customers.

Taxpayer argues that it was simply acting as an agent for the two entities. Taxpayer maintains that – because of the agency/principal relationship it has with the entities – it stands in the same shoes as Hyatt in *Hyatt*, because the entities could presumably have purchased food and served that food free-of-charge to the entities' own employees and the entities' own customers, Taxpayer stands in the stead of the two entities and can purchase and serve meals to the entities' employees and guests without collecting sales tax.

However, it should be noted that Taxpayer wants something more than Hyatt in *Hyatt*. In that case, Hyatt wanted to buy unprepared food without paying sales tax. *Hyatt*, 695 N.E.2d at 1054-55. Taxpayer wants to receive tax-free payment from the entities for the cost of the cooked and prepared meals along with the cost of procuring, preparing, and delivering the food to the entities' employees and customers. As set out in the parties' Limited Agency Agreement, "In consideration of the [Taxpayer's] performance of its duties under this Agreement, [the entities] shall reimburse [Taxpayer] monthly for the actual cost of food purchased and other costs and expenses incurred in connection with the provision of food to [the entities'] employees and [customers]." Essentially, Taxpayer wanted to operate a restaurant/catering business without having to charge sales tax when it receives payment for serving meals.

The Department must respectfully disagree with Taxpayer's argument because it does not conclude that the rules governing the interplay between the gross income tax and agency/principal standards are relevant in determining whether a retail transaction occurs when the entities pay Taxpayer for the cost of meals served to other than the Taxpayer's own employees. As recognized in the parties' own "Limited Agency Agreement," "[A]s part of [Taxpayer's] Business, [Taxpayer] maintains and operates [] a cafeteria for the purpose of producing, preparing and delivering food to [Taxpayer's] employees and to the [entities'] employees." (*Emphasis added*). Elsewhere in the same document, the parties recognize "also as a part of [Taxpayer's] Business, [Taxpayer] maintains and operates certain other facilities for the purpose of procuring, preparing and delivering food to the [the entities' customers].... [Taxpayer] operates the [customer facilities] and provides such food free-of-charge to [customers] who bear compensation certificates...." (*Emphasis added*).

The agency/principal arrangement is an irrelevancy in determining whether Taxpayer should have collected sales tax on the money it received for serving meals to other than its own employees. Taxpayer was in the "business" of running a restaurant/cafeteria service. It bought and prepared food which it served to persons other than its own employees. Taxpayer received payments based upon the number of meals served to persons other than its own employees. These transactions were subject to the gross retail tax, and Taxpayer should have collected sales tax each time it received a payment.

B. December 2003 and Later

In December 2003, Taxpayer and Company entered into a contract for providing Taxpayer's dining services. Taxpayer paid Company the cost of providing meals to the entities' customers and the entities' employees plus a fee, less the amount of "cash sales" on which Company collected cash. Company was responsible for collecting sales tax on the meals sold by Company. However, Company did not collect or remit sales tax on meals provided to the entities' employees and the entities' customers and on which Company did not receive currency. The Department determined that Taxpayer used the prepared meals and assessed Taxpayer use tax.

Under IC § 6-2.5-3-2, the use tax "is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." While IC § 6-2.5-5-20 provides an exemption for "food and food ingredients for human consumption," IC § 6-2.5-5-20(c) states:

(c) Except as otherwise provided by subsection (b), for purposes of this section, the term "food and food ingredients for human consumption" does not include:

(1) candy;

- (2) alcoholic beverages;
- (3) soft drinks;
- (4) food sold through a vending machine;
- (5) food sold in a heated state or heated by the seller;
- (6) two (2) or more food ingredients mixed or combined by the seller for sale as a single item (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne illnesses);
- (7) food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws (for purposes of this subdivision, a plate does not include a container or packaging used to transport the food); or
- (8) tobacco.

Taxpayer paid Company for providing meals. The meals were not exempt from sales tax. Therefore, Taxpayer received tangible personal property in a retail transaction and the transaction was not exempt from sales tax. The Department's use tax assessment against Taxpayer was proper.

FINDING

Taxpayer's protest is respectfully denied.

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